Supreme Court, U.S.
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No. 96-1719

IN THE

Supreme Court of the United States

October Term, 1997

MATTHEW J. GALLO, AL DUMAS, THOMAS E. GRAY, NEAL GOLDBERG, AND ELIJAH LEWIS, individually and on behalf of all others similarly situated,

Petitioners,

v.

AMOCO CORPORATION AS PLAN ADMINISTRATOR AND EMPLOYEE RETIREMENT PLAN OF AMOCO CORPORATION AND PARTICIPATING COMPANIES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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Response to Question Presented

There is a misstatement in the Petition for Writ of Certiorari about what issues properly would be before the Court if certiorari were granted. The question presented in Gallo's Petition for Writ of Certiorari is:

> Does a pension plan fiduciary abuse his interpretive discretion under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and his duty under 29 U.S.C. § 1102(a)(1) to maintain an "employee benefit plan . . . pursuant to a written instrument," when without textual authority in the plan and without disclosure to plan participants, he detrimentally excludes compensation from a pension formula contrary to the uniform plan definition, solely on the basis of theoretical rationalizations which are presented for the first time after the practice is challenged in court?

Amoco agrees that the question presented by this case is whether Amoco's pension plan fiduciary abused his discretion under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Amoco, however, objects to Gallo's misstatement that a question presented by this case is whether a plan fiduciary abuses "his duty under 29 U.S.C. § 1102(a)(1) to maintain an 'employee benefit plan . . . pursuant to a written instrument,. . ." Petitioners did not make this argument in the courts below. In fact, none of Gallo's district court or appellate briefs cited to 29 U.S.C. § 1102(a)(1), and Gallo has never, until now, argued that Amoco's plan administrator abused his duty under 29 U.S.C. § 1102(a)(1). Gallo does not even make this argument in the text of the Petition. Amoco, therefore, objects to the petitioners' suggestion that this issue

would properly be before the Court if certiorari were granted.

Amoco also objects to that portion of the question presented that claims the plan administrator's determination was "contrary to the uniform plan definition" and based "solely on ... theoretical rationalizations presented for the first time ... in court." As discussed in the text of this response to the Petition, both of those statements are factual misrepresentations which are contrary to the record and not supported in the text of the Petition.

Table of Contents

Response to Question Presented i

Table of Authorities iv

Statutory Provision Involved 1

Reasons for Denying The Writ 2

I. The Seventh Circuit Decision In *Gallo* Was A Straightforward, Consistent Application Of Settled Law Among The Circuits 2

II. There Is No Conflict Between The Seventh And The Fifth And Eighth Circuits Over The Role Of Plan Text In Deferential Judicial Review 5

Conclusion 11

Table of Authorities

Cases

	Page(s)
Batchelor v. International Brotherhood of Electrical Workers Local 861 Pension Fund, 877 F.2d 441 (5th Cir. 1989)	5, 6, 7
Bellaire General Hosp. v. Blue Cross Blue Shield, 97 F.3d 822 (5th Cir. 1996)	6, 8
Butler v. Encyclopedia Britannica, 41 F.3d 285 (7th Cir. 1994)	6
Chojnacki v. Georgia-Pacific Corp., 108 F.3d 810 (7th Cir. 1997)	7
Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir. 1982)	7
Donaho v. FMC Corp., 74 F.3d 894 (8th Cir. 1996)	7, 8
Donato v. Metropolitan Life Ins. Co., 19 F.3d 375 (7th Cir. 1994)	7
Duhon v. Texaco, Inc., 15 F.3d 1302 (5th Cir. 1994)	6
Egert v. Connecticut General Life Ins. Co., 900 F.2d 1032 (7th Cir. 1990)	7
Finley v. Special Agents Mutual Benefits Association, 957 F.2d 617 (8th Cir. 1992)	5, 8
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)	i, 3, 8
Krawczyk v. Harnischfeger Corp., 41 F.3d 276 (7th Cir. 1994)	6, 7, 8
Lickteig v. Business Men's Assurance Co. of America, 61 F.3d 579 (8th Cir. 1995)	7
Lowry v. Bankers Life & Casualty Retirement Plan, 865 F.2d 692 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989)	10
Loyola Univ. v. Humana Ins. Co., 996 F.2d 895 (7th Cir. 1993)	6

	Page(s)
Monson v. Century Mfg. Co., 739 F.2d 1293 (8th Cir. 1984)	8
Reilly v. Blue Cross & Blue Shield United, 846 F.2d 416 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988)	7
Russo v. Health, Welfare & Pension Fund, Local 705, 984 F.2d 762 (7th Cir. 1993)	6

Statutes

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1102(a)(1)	i, 1
Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132	2

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BRIEF IN OPPOSITION

Statutory Provision Involved

Petitioners suggest that other than certain jurisdictional statutes, the statutory provision involved in this case is 29 U.S.C. § 1102(a)(1). For the reasons stated in the Response to Question Presented, the petition misstates the federal statutory provision involved in this litigation over employee benefits.

The statutory provision involved is Section 502 of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1132, which provides in relevant part:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .

Reasons for Denying the Writ

I. The Seventh Circuit Decision In *Gallo* Was A Straightforward, Consistent Application Of Settled Law Among The Circuits.

Reading petitioners' Petition for Writ of Certiorari in isolation, one would think that the Seventh Circuit's *Gallo* decision challenged existing case law from other circuits, explicitly fashioned a new "abject deference" standard of review and applied that new standard to reach a bizarre result. The truth is quite different. The decision applied well-settled legal standards (on which the Courts of Appeals are in harmony) to a straightforward question of pension plan interpretation. Not surprisingly, the unanimous *Gallo* panel decision, authored by Chief Judge Posner and joined by Judges Cudahy and Wood, did not provoke a single vote for rehearing *en banc*. (App. at A-39).

The *Gallo* decision addressed whether Amoco Corporation (Amoco), the plan administrator of its defined benefit retirement plan, had acted arbitrarily and capriciously in interpreting the plan. Specifically, the practice of the plan administrator was to exclude a one-time cash payment in lieu of foregone paid vacation, paid by Amoco to an employee at the end of employment, from the employee's earnings used to calculate the plan's Annuity Benefit (final pay pension) formula. As the Court of Appeals recognized, "the plan documents are silent on the issue . . ." (App. at A-6); the plan uses a simple definition of "earnings" which does not separately address whether each of hundreds of items of compensation offered by Amoco is excluded from or included in this pension calculation. (The plan documents do inform employees that some compensation items are excluded from pension formula "earnings" and provide several examples of excluded items). The decision also recognized that *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989), required applying the deferential "arbitrary and capricious" judicial review standard, because Amoco's plan specifically authorizes the plan administrator to interpret the plan. The decision specifically noted that "[d]eferential review is not no review; deference need not be abject." (App. at A-8).

Applying this (not abjectly) deferential review standard, the Court identified various factors reflecting the reasonableness of Amoco's interpretation. The Court at the outset noted the critical importance of the "consistent administration of the plan since its inception" excluding pay in lieu of vacation from Annuity Benefit formula earnings. Next, addressing the point that Amoco interpreted a common "earnings" definition as excluding pay in lieu of vacation from the Annuity Benefit formula but including it in the

Career Average Minimum formula, (App. at A-6, A-7), the Court of Appeals noted the differing goals of the two formulas and how, given those goals, Amoco's differing treatments of pay in lieu of vacation served the purposes of the plan. The Court then cited the uncontroverted record evidence that defined benefit plans like Amoco's often exclude pay in lieu of vacation from final pay formula earnings, going on to explain at some length the logic of such plans wanting to avoid both "arbitrary and sometimes quite large differentials among otherwise similarly situated employees" and the extraordinary disincentive to take a vacation in one's last year of employment that including pay in lieu of vacation in a final pay formula would cause. (App. at A-7). The Court further noted that petitioners' claim seeks a windfall "double-counting" in the pension calculation of both regular salary and pay in lieu of vacation for the same days in the "High 3" salary years. (App. at A-7).[1] Finally, the Court pointed out that the effect of petitioners' desired administrative approach would be akin to including severance pay, which is expressly excluded, in the Annuity Benefit formula calculation. (App. at A-7).

The Court recognized that Amoco's interpretation was not necessarily correct but was entitled to deferential court review: "[w]hen as in this case the plan document does not furnish the answer to the question," the plan administrator's interpretation ordinarily governs. (App. at A-8). Specifically rejecting the "abject deference"

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[1] While Petitioners' Question Presented claims that Amoco's reasons for its interpretation were presented "for the first time" in court, the Court of Appeals correctly noted that the "double-counting" issue, the consistent interpretation issue and the one-time payment issue were all stated in the plan administrator's letters during Gallo's administrative appeal.

which Gallo claims it adopted, the Court of Appeals observed that a plan's structure, prior inconsistent interpretations, or an interpretation lacking in common sense might require a conclusion that a plan administrator's determination flunks even deferential review. Given the many considerations supporting Amoco's determination, however, the Court concluded that there was no basis for vacating the plan administrator's determination in this case because Amoco's interpretation of the plan was not arbitrary and capricious. (App. at A-11).

II. There Is No Conflict Between The Seventh And The Fifth And Eighth Circuits Over The Role Of Plan Text In Deferential Judicial Review.

The "direct conflict" of which petitioners speak is a figment of their imaginations. When one examines applicable Fifth, Seventh, and Eighth Circuit precedents, one sees that each circuit considers the same factors in applying deferential review under ERISA and, indeed, often relies on decisions from the other two circuits.

Petitioners claim that the *Gallo* decision is in conflict with *Batchelor v. International Brotherhood of Electrical Workers Local 861 Pension Fund*, 877 F.2d 441 (5th Cir. 1989) and *Finley v. Special Agents Mutual Benefit Association*, 957 F.2d 617 (8th Cir. 1992). Reading these decisions, however, reveals that, regardless of minor methodological differences (*Batchelor's* two-step versus *Finley's* more common one-step process), both identify many of the same considerations: whether there is clear plan language, the consistency (over time) of the plan's interpretation, whether the challenged interpretation creates an internal inconsistency, and whether the challenged interpretation conflicts with other legal requirements. *Finley* also speaks of "plan purpose" as a factor, and Batchelor adds a few

other factors: whether the challenged interpretation is a "fair and reasonable reading" of the plan, whether the challenged interpretation, if overturned, will subject a plan to unanticipated costs, and whether the factual background of the challenged interpretation supports an inference of lack of good faith.[2]

These considerations are the same ones applied in the Seventh Circuit. In *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 278 (7th Cir. 1994), the Seventh Circuit described the discretionary review standard as requiring "a reasoned explanation, based on the evidence, for a particular outcome" and then looked to the plan sponsor's intent, the consistency of the plan administrator's interpretation, and whether the claimant's interpretation would lead to substantial, unanticipated costs. In *Butler v. Encyclopedia Britannica*, 41 F.3d 285, 290-91 (7th Cir. 1994), the Seventh Circuit considered the plan's overall structure, applicable statutory and regulatory requirements, and the administrator's desire to avoid creating a benefits disparity among similarly situated employees. In *Loyola Univ. v. Humana Ins. Co.*, 996 F.2d 895, 898 (7th Cir. 1993), the Seventh Circuit noted at the outset that a plan administrator's interpretation must be assessed to see whether it reflects "a reasonable interpretation of the plan documents." And, in *Russo v. Health, Welfare & Pension Fund, Local 705*, 984 F.2d 762, 766 (7th Cir. 1993), the Seventh Circuit noted the critical importance of uniform (i.e.,

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[2] While *Batchelor* suggests working through a two-step process, more recently the Fifth Circuit has observed that it is "not rigidly confined to this two-step analysis in every case." *Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1307 n. 3 (5th Cir. 1994). Most recently, in *Bellaire General Hosp. v. Blue Cross Blue Shield*, 97 F. 3d 822 (5th Cir. 1996), the Fifth Circuit did not apply or even mention the two step process but did apply the same factors discussed above.

consistent over time) plan interpretation. *Gallo*, itself, has already been cited by the Seventh Circuit for the uniform plan interpretation factor. *Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 816 (7th Cir. 1997).

While petitioners claim a conflict in the circuits, neither the *Gallo* opinion nor the other opinions of the Seventh Circuit suggest that the judges see any such conflict. On the contrary, the Seventh Circuit often has cited precedent from the two circuits with which it supposedly is in conflict. See *Krawczyk*, 41 F.3d at 279, citing a Fifth Circuit decision for the "unanticipated costs" factor; *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1037 (7th Cir. 1990), referencing *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982), the foundation for *Batchelor*, for the "uniformity of construction" and "fair reading" factors; *Reilly v. Blue Cross & Blue Shield United*, 846 F.2d 416, 420 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988), a unanimous panel decision in which Chief Judge Posner joined, citing *Dennard* from the Fifth Circuit.

Fifth and Eighth Circuit decisions also reflect the same harmony with the Seventh Circuit decisions. See *Donaho v. FMC Corp.*, 74 F.3d 894, 899 (8th Cir. 1996), citing *Krawczyk* for the view that a plan administrator's decision must merely offer "a reasoned explanation, based on the evidence" and "should not be disturbed, even if another reasonable, but different, interpretation may be made." Even cases that do not cite the Seventh Circuit use its approach. Compare *Lickteig v. Business Men's Assurance Co. of America*, 61 F.3d 579, 583 (8th Cir. 1995) ("The trustees' decision to deny benefits will be deemed an abuse of discretion if the action is 'extraordinarily imprudent or extremely unreasonable'") (citations omitted), with *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 380 (7th Cir. 1994) ("downright unreasonable" standard). See

also, *Bellaire General Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 828 (5th Cir. 1996) in which, although not citing Seventh Circuit authority, the Fifth Circuit affirms as the "proper standard of review" whether the administrator's decision was made "without a rational connection between the known facts and the decision or between the found facts and the evidence," a formulation quite similar to the Seventh Circuit's in *Krawczyk* (and the Eighth Circuit's in *Donaho*).

Taken together, these cases show great consistency—in their recognition of *Firestone* as the governing Supreme Court precedent, in the tenor of their discussion of deferential court review, and in their recitation of relevant factors in exercising that deference. The *Gallo* decision fits neatly in this line of case law. The *Gallo* decision defers to *Firestone*, cites and relies on seven of the Seventh Circuit's plan interpretation cases and three benefits decisions of other circuits, gives justified deference to the plan administrator, and applies those of the factors which are pertinent. In no way does the decision either explicitly, or even implicitly, challenge how either the Fifth or the Eighth Circuits would approach the same case.[3]

Besides being wrong on the law, petitioners' polemic concerning the rift between the Seventh and the two other Circuits degenerates into unwarranted harsh criticism of

[3] The ultimate oddity about petitioners' split in the circuits argument is that they did not think enough of it to make it in their Petition for Rehearing En Banc filed in the Seventh Circuit. Instead of giving that Court the opportunity to avoid the appellate conflict petitioners now contend justifies Supreme Court intervention, petitioners cited in their petition for rehearing a different (than *Finley*) Eighth Circuit case, *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir. 1984), for different alleged conflict in the circuits petitioners now have abandoned.

Chief Judge Posner's decision. The decision, petitioners say, has "cut the tether between plan text and abuse of discretion analysis", (Petition at 8); adopts a "philosophical nominalism [which] takes the extreme form of divorcing abuse of discretion analysis from the presumptively arbitrary pension plan text" (*Id.*); establishes an "ultra-deferential standard [of review, under which] the Trustee will virtually always prevail ... [because] [t]he text of the plan and summary plan description may be ignored in the face of these more important abstract arguments", (*Id.* at 9); and "has abandoned one of ERISA's most fundamental touchstones of analysis", (*Id.* at 10). Yet, with all of these colorful condemnations of the decision for ignoring pertinent plan language, petitioners never identify the plan language the Seventh Circuit allegedly has ignored. This is particularly ironic given that the one thing on which the Seventh Circuit and the District Court decisions agree is that the plan documents do not address the issue of whether to count pay in lieu of vacation in the pension formula: "Neither the Plan nor the SPD expressly addresses pay in lieu of vacation", (App. at A-18); "The plan documents are silent on the issue of treating payments in lieu of vacation as earnings ...", (App. at A-6). Judge Posner was careful to point this out at various places in his analysis. When petitioners argue as though the Court refused to consider explicit plan language providing an obvious answer to the question presented, they are describing a sin the Court did not commit.

In a final argument, relying on the reversed District Court decision, petitioners claim that "under the Fifth and Eighth Circuit's (sic) analyses" they "would have prevailed". (Petition at 11). Petitioners make this argument ignoring a Fifth Circuit case which very closely parallels this case and which Amoco relied on in the Court of

Appeals briefing and argument. In *Lowry v. Bankers Life & Casualty Retirement Plan*, 865 F.2d 692 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989), the Fifth Circuit upheld a retirement plan administrator's determination that "overwrite commissions" — received by an insurance general agent based on the sales of sub-agents — were not within the plan's general definitions of "compensation" or "remuneration" which neither specifically included or excluded overwrite commissions. The Court in *Lowry*, as did the Court in *Gallo*, accepted the plan administrator's interpretation that the particular item of compensation was not to be included in the calculation of pension benefits. The Fifth Circuit explained that it was keeping its "eyes firmly fixed on the arbitrary and capricious standard, keenly aware of the discretion that must necessarily be exercised by trustees" and noted the administrator's uniform plan construction excluding overwrite commissions and the substantial unforeseen costs which would result from including them. *Lowry*, 865 F.2d at 694. The similarities between the *Lowry* and *Gallo* results and analyses strike the final blow against any contention that the judicial review standards of these circuits are in conflict.

Conclusion

For the foregoing reasons, plaintiffs' petition for writ of certiorari should be denied.

Respectfully submitted,

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